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9
10 **UNITED STATES DISTRICT COURT**
11 **CENTRAL DISTRICT OF CALIFORNIA**

12 TAMARA MILLER, individually and on
13 behalf of all others similarly situated,

14 Plaintiff,

15 vs.

16 BLOOM RETIREMENT
17 HOLDINGS, INC., f/k/a
18 AMERICAN ADVISORS GROUP, a
19 California corporation,

20 Defendant.

21 Case No. 8:23-cv-00839-FWS-JDE

22 **DEFENDANT'S NOTICE OF**
23 **MOTION AND MOTION TO**
24 **DISMISS PLAINTIFF'S SECOND**
25 **AMENDED COMPLAINT;**
26 **MEMORANDUM OF POINTS AND**
27 **AUTHORITIES IN SUPPORT**
28 **THEREOF**

29 Date: November 16, 2023
30 Time: 10:00 a.m.
31 Judge: Hon. Fred W. Slaughter
32 Crtrm: 10D
33 Filed: May 11, 2023

NOTICE OF MOTION AND MOTION

PLEASE TAKE NOTICE THAT, on November 16, 2023, at 10:00 a.m. or as soon thereafter as counsel may be heard, in the courtroom of the Honorable Fred W. Slaughter, or another judge sitting in his stead, located in Courtroom 10D of the Ronald Reagan Federal Building and U.S. Courthouse, 411 West Fourth Street, Santa Ana, CA, 92701-4516, Defendant Bloom Retirement Holdings, Inc., f/k/a American Advisors Group (“Defendant”¹), will and does hereby respectfully move to dismiss the putative Second Amended Class Action Complaint (*see* Dkt. 28, “SAC”) filed by Tamara Miller (“Plaintiff”) in this matter, in its entirety and with prejudice, pursuant to (i) Fed. R. Civ. P. 12(b)(6) for failure to state a claim for relief, and/or (ii) Fed. R. Civ. P. 12(b)(1) for lack of federal subject matter jurisdiction due to Plaintiff’s lack of standing under Article III of the U.S. Constitution.

As demonstrated in the accompanying Memorandum of Points and Authorities, the SAC should be dismissed in its entirety because Plaintiff fails to plead adequate facts, in accordance with federal pleadings standards, supporting a plausible claim for relief under the federal Telephone Consumer Protection Act (“TCPA”), 47 U.S.C. § 227, *et seq.*, or demonstrating her Article III standing to seek such relief. Specifically, Plaintiff fails to plead sufficient non-conclusory facts supporting or demonstrating, *inter alia*: (i) Defendant’s direct or vicarious liability under the TCPA, (ii) the other essential elements of her asserted claims under Sections 227(b) or 227(c) of the TCPA, or (iii) that she satisfies the requisite elements for standing under Article III to bring her claims or to seek injunctive relief. Thus, the SAC is subject to dismissal in its entirety on any one or all of these grounds under Rules 12(b)(6) and/or 12(b)(1). Further, as the SAC represents Plaintiff’s third defective pleading in this case, she should not be afforded a fourth opportunity and, therefore, the entire SAC would be dismissed with prejudice.

¹ For convenience purposes, Defendant's former name is referred to in the supporting Memorandum below as "American Advisors Group" or "AAG" where applicable.

This Motion is based on this Notice of Motion and Motion, the incorporated Memorandum of Points and Authorities below, all papers on file herein, all matters subject to judicial notice, and any argument or evidence that may be presented to or considered by the Court prior to ruling.

This Motion is made following the conference of counsel pursuant to L.R. 7-3, which took place on October 4, 5, 6, and 9, 2023, via email and telephone. The parties were unable to reach an agreement thereon and, as such, this Motion is opposed.

Dated: October 11, 2023

Respectfully submitted,

MANATT, PHELPS & PHILLIPS, LLP

By: /s/ John W. McGuinness
John W. McGuinness

Counsel for Defendant

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiff's SAC, filed in response to Defendant's previous motion to dismiss
 4 (*see* Dkt. 23), does not cure any of the fatal pleading defects of its predecessor, made
 5 those defects worse by adding a new equally-faulty claim, and is equally ripe for
 6 dismissal. In it, Plaintiff still does little more than allege, in an entirely conclusory
 7 fashion and without any requisite factual support, that Defendant violated the
 8 TCPA—including the “automated” call restrictions in 47 U.S.C. § 227(b) like she
 9 claimed before (Count I), and now also the National “Do-Not-Call” (“DNC”)
 10 Registry provisions in 47 U.S.C. § 227(c) (Count II). These claims rest squarely on
 11 a handful of ill-described calls, allegedly made to her cellular phone number (which
 12 she now claims is on the National DNC Registry) by someone using an “automatic
 13 telephone dialing system” (a.k.a. “autodialer” or “ATDS”) and/or a “prerecorded”
 14 voice without her consent. Despite her scant amendments to her prior pleading,
 15 however, Plaintiff still fails to plead sufficient (or any) non-conclusory facts
 16 supporting a plausible inference that Defendant bears any legal responsibility for
 17 those calls, let alone that those calls even violated the TCPA in the first instance.

18 Regardless, merely regurgitating the legal elements of a claim without
 19 supporting facts, as Plaintiff's SAC continues to do in this case, does not comply with
 20 federal pleading standards and cannot avoid dismissal in any federal case. Moreover,
 21 as the SAC represents Plaintiff's third failed attempt to state a plausible claim against
 22 Defendant here, and she made no effort to address the many pleading defects outlined
 23 in Defendant's previous motion, she should not be afforded a fourth opportunity,
 24 which will surely result in another fatally-flawed pleading. Accordingly, Plaintiff's
 25 entire SAC should be dismissed with prejudice for at least the following reasons:

26 **First**, the SAC should be dismissed under Rule 12(b)(6), as Plaintiff fails to
 27 state a plausible claim under the TCPA or to plead adequate facts supporting such a
 28 claim. For starters, to successfully plead *any* TCPA claim and avoid dismissal, all

1 plaintiffs must first allege a viable theory of liability—*i.e.*, direct or vicarious liability.
 2 Here, Plaintiff still fails to plead sufficient, non-conclusory facts supporting a plausible
 3 inference either that Defendant: (i) itself, and not a third party, “physically” took any
 4 steps to place any calls to her, as is required to plead direct TCPA liability; or (ii) was
 5 in a common law agency with (the touchstone of which is “control” over) any third
 6 party who did physically call her and that party’s call campaign,² as is required to plead
 7 vicarious TCPA liability. This defect *alone* is fatal to Plaintiff’s *entire* SAC under the
 8 weight of applicable authority. Indeed, myriad courts in and beyond the Ninth Circuit
 9 have recognized that simply taking an “either/or” pleading approach and concluding a
 10 “defendant or its agent called me” (like Plaintiff has done here) is insufficient to avoid
 11 dismissal of a TCPA claim at the pleadings stage on these bases under Rule 12(b)(6).
 12 The Court should rule similarly in the present case, and dismiss Plaintiff’s SAC.

13 **Second**, as to Count I, the SAC remains devoid of any facts supporting
 14 Plaintiff’s conclusory allegations that any call she received was made using an ATDS
 15 or involved a “pre-recorded voice,” as is also required to state a claim under Section
 16 227(b) of the TCPA. While courts do not expect a plaintiff to know the exact technical
 17 specifications at this stage, they have consistently held that plaintiffs must plead actual
 18 facts supporting an inference that such technology was actually used, and cannot
 19 simply parrot the language of the statute. The latter is all that Plaintiff still does here.

20 **Third**, as to her new Count II, Plaintiff’s attempt to add a National DNC
 21 Registry claim under Section 227(c) of the TCPA falls flat. That is because Plaintiff
 22 fails to plead any facts supporting the other essential elements of such a claim,
 23 including that (i) she received more than one “telephone solicitation” that was
 24 physically placed “by or on behalf of the same entity” in a 12-month period, or (ii) she
 25 qualifies as a “residential telephone subscriber” entitled to bring such a claim.

26 **Lastly**, in addition to dismissal under Rule 12(b)(6), the Court should also

28 ² As discussed below, general “control” over an agent is insufficient, and what matters
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 ATTORNEYS AT LAW

in a TCPA case is control over how the call campaign was conducted specifically.

1 dismiss Plaintiff's entire SAC under Rule 12(b)(1) because Plaintiff still fails to plead
 2 sufficient (or any) facts that satisfy at least two of the requisite elements for showing
 3 standing under Article III of the U.S. Constitution—*i.e.*, causation and
 4 redressability.³ In this regard, Plaintiff does not plead sufficient facts tracing any
 5 alleged unlawful conduct or harm to any act by Defendant itself, as opposed to some
 6 third party not before this Court, despite having amended her pleading; and
 7 Defendant cannot possibly redress harm caused by unidentified third parties.
 8 Additionally, Plaintiff's requests for injunctive relief also must be dismissed under
 9 Rule 12(b)(1), at the very minimum, because she does not allege any threat of future
 10 injury, as required for Article III standing to seek injunctive relief in any federal case.

11 **II. RELEVANT ALLEGATIONS**

12 Despite having amended, Plaintiff added very little to her SAC beyond a new
 13 claim. Indeed, like before, her SAC contains virtually no actual facts, beyond her bald
 14 conclusions, supporting her TCPA claims. Instead, the *sum total* of the relevant and
 15 remotely “factual” (but still improperly conclusory) allegations pled in support of her
 16 claims appear in just six paragraphs (¶¶ 21-25, 37), and are restated verbatim below:

- 17 • “Plaintiff registered her cellphone number on the National Do Not
 Call Registry on April 25, 2020.”
- 18 • “On June 16, 2020, Plaintiff answered a telephone call placed to
 Plaintiff’s cellphone (with a number ending in 5895) from (985) 228-
 9301, and was greeted by a pre-recorded voice. The pre-recorded
 voice asked how much Plaintiff paid on her mortgage and the amount
 remaining on the mortgage. This call was placed by or on behalf of
 AAG, for AAG’s benefit.”
- 19 • “Plaintiff received four (4) additional prerecorded calls from or on
 behalf of AAG. These calls were received on June 17, 2020, June 23,
 2020, June 29, 2020, and July 7, 2020.”
- 20 • “Plaintiff also received two (2) ‘live’ calls from AAG, from the
 number 225-224-6948, both placed on June 23, 2020. After one of

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 27 ³ Though not addressed below, Defendant does not concede, and indeed disputes, that
 28 Plaintiff has suffered (or pled) a concrete and particularized “injury-in-fact” as also
 required for Article III standing and thus reserves the right to address this issue later.

1 these calls, Plaintiff received an email from the email address
 2 contactus@learn.americanadvisorsgroup.com.”⁴
 3

- 4 • “Plaintiff has never provided her prior express written consent for
 5 Defendant to call her using an autodialer or a pre-recorded voice.”
- 6 • “Defendant made the prerecorded calls using equipment that had the
 7 capacity to store or produce telephone numbers using a random or
 8 sequential number generator, to receive and store lists of phone
 9 numbers, and to dial such numbers, *en masse*, without human
 10 intervention. The telephone dialing equipment utilized by Defendant,
 11 also known as a predictive dialer, dialed numbers from a list, or dialed
 12 numbers from a database of telephone numbers, in an automatic and
 13 systematic manner. Defendant’s autodialer disseminated information
 14 *en masse* to Plaintiff and other consumers.”

15 Rather, Plaintiff’s SAC is more notable for what facts it does not contain, as
 16 opposed to what few (if any) facts it does. For example, even after having amended
 17 her prior pleading, Plaintiff still does not allege, *inter alia*, that: (i) Defendant owned
 18 or used either of the two phone numbers purportedly used to call her, much less who
 19 actually does own or use those numbers; (ii) “American Advisors Group” or “AAG”
 20 was identified in any fashion during any call, or that those words were even said for
 21 that matter; (iii) she was offered any AAG products and services on any call; (iv) she
 22 has any factual basis for concluding that any call involved a “pre-recorded voice” as
 23 opposed to a live person speaking; (v) she even answered the four “additional” calls,
 24 such that she could plausibly allege they involved a “prerecorded” voice at all; or (vi)
 25 she has any factual basis supporting her conclusion that a “predictive dialer” was
 26 used, let alone that a “random or sequential number generator” was used, to call her.

27 Further, not only does Plaintiff’s SAC still contain many internally
 28 contradictory (and thus inherently implausible) allegations, but it also contains new
 29 allegations directly contradicting those from her previous pleading (*see* Dkt. 17)—
 30 all of which belies her bald conclusions that Defendant was responsible for the calls
 31 at issue here. For example, while Plaintiff added a vague allegation about an email
 32 she purportedly received from someone using a “learn.americanadvisorsgroup.com”

28 ⁴ Tellingly, the content of this purported email is not provided, nor is it attached.

1 email address after one call (*see* Dkt. 28, ¶ 24), presumably so she can try to argue
 2 direct liability, she added an equally vague and conclusory allegation about a “third
 3 party” whom she speculates may have “made the calls … on behalf of Defendant”
 4 and was acting “at Defendant’s direction and control” (*id.* ¶ 20). Similarly, while
 5 Plaintiff’s SAC still suggests that Defendant itself “made the prerecorded calls” using
 6 a “predictive dialer” (¶ 37), it still concludes elsewhere several times, with no factual
 7 support, that the calls were made by an unidentified “third party” acting “on behalf
 8 of” Defendant, rather than Defendant itself (*e.g.*, ¶¶ 17, 20, 22, 29, 44, 45). While
 9 Plaintiff still alleges in her SAC that the supposed “pre-recorded voice” for some (but
 10 not all) of the calls “asked how much [she] paid on her **mortgage** and the amount
 11 remaining on the **mortgage**” and (albeit inaccurately) that AAG “engage[d] in the
 12 practice of manufacturing and offering financing options including **reverse**
 13 **mortgages** to homeowners” (*id.*, ¶¶ 1, 22), she had previously averred the “calls were
 14 for telemarketing purposes and announced the commercial availability of
 15 Defendant’s **hearing aid goods and services**” (Dkt. 17, ¶ 34) (emphasis added).⁵

16 As shown below, these allegations are woefully inadequate on many levels.

17 III. APPLICABLE LEGAL STANDARDS

18 A. Fed. R. Civ. P. 12(b)(6): Failure to State a Claim For Relief

19 Rule 12(b)(6) provides for dismissal for failing to state a claim for relief. Any
 20 claim brought in federal court mandates the pleading of sufficient facts. *See Bell Atl.*
21 Corp. v. Twombly, 550 U.S. 544, 556-57 (2007). A “bare assertion” and “conclusory
 22 allegation[s]” will not suffice. *Id.* Naked allegations without factual enhancements
 23 “stop[] short of the line between possibility and plausibility of entitlement to relief.”
Id. (internal quotations omitted). A “formulaic recitation of the elements” of a claim is
 24 likewise insufficient. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *see also id.*

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(pleadings must contain “more than an unadorned, the-defendant-unlawfully-harmed-me accusation”). Rather, “[t]o survive a Rule 12(b)(6) dismissal, a complaint must allege enough specific facts to provide both ‘fair notice’ of the particular claim being asserted and ‘the grounds upon which it rests.’” *Massey v. Biola Univ., Inc.*, 2020 WL 2476173, at *5 (C.D. Cal. Apr. 10, 2020), *report and rec. adopted*, 2020 WL 2468765 (May 13, 2020) (quoting *Twombly*, 550 U.S. at 555 & n.3).

Under this rule, the Court “accepts factual allegations in the [SAC] as true and construes the pleadings in the light most favorable” to Plaintiff. *Colony Cove Properties, LLC v. City of Carson*, 640 F.3d 948, 955 (9th Cir. 2011). But it need not accept as true allegations that, like Plaintiff’s, “are merely conclusory, unwarranted deductions of fact, or unreasonable inferences.” *Wilson v. Hewlett-Packard Co.*, 668 F.3d 1136, 1145 n.4 (9th Cir. 2012); *see also nexTUNE, Inc. v. McKinney*, 2013 WL 2403243, at *4 (W.D. Wash. May 31, 2013) (“[S]peculation unsupported by any factual allegation is insufficient to survive a motion to dismiss under 12(b)(6).”) (citing *In re Gilead Scis. Sec. Litig.*, 536 F.3d 1049, 1055 (9th Cir. 2008)).

Moreover, the Court also need not accept as true allegations in an amended pleading that directly contradict those averred in Plaintiff’s previous pleadings, and in fact may strike the changed allegations as “false or sham.” *Azadpour v. Sun Microsystems, Inc.*, 2007 WL 2141079, at *2, n.2 (N.D. Cal. July 23, 2007); *IV Sols., Inc. v. Empire Healthchoice Assurance, Inc.*, 2020 WL 5802017, at *2 (C.D. Cal. Sept. 29, 2020); *see also Forney v. Hair Club for Men Ltd., Inc.*, 2017 WL 4685549, at *3 (C.D. Cal. June 26, 2017) (applying rule in TCPA case); *Reddy v. Litton Indus., Inc.*, 912 F.2d 291, 296–97 (9th Cir. 1990) (an “amended complaint may only allege other facts consistent with the challenged pleading”). The Court may also “look to prior pleadings [and exhibits attached thereto] in determining the plausibility of an amended complaint.” *Peters v. Hollie*, 2019 WL 1556661, at *5, n.3 (E.D. Cal. Apr. 10, 2019) (citing *Rodriguez v. Sony Comput. Entm’t Am., LLC*, 801 F.3d 1045, 1054 (9th Cir. 2015) and *Daniels-Hall v. Nat’l Educ. Ass’n*, 629 F.3d 992, 998 (9th Cir. 2010)).

1 **B. Fed. R. Civ. P. 12(b)(1): Lack of Subject Matter Jurisdiction**

2 Rule 12(b)(1) provides for dismissal of a complaint where, as here, there is a
 3 lack of subject matter jurisdiction. In this regard, Article III of the U.S. Constitution
 4 confers on the federal judiciary the power to adjudicate certain cases and
 5 controversies. To establish Article III standing, (i) a plaintiff must have suffered a
 6 concrete and particularized “injury in fact”; (ii) there must be a causal connection
 7 between the injury and the conduct complained of (*i.e.*, “causation” or “traceability”);
 8 and (iii) the injury must be capable of being redressed by a favorable decision (*i.e.*,
 9 “redressability”). *See, e.g., Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61
 10 (1992); *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 125
 11 (2014); *see also Spokeo, Inc. v. Robins*, 136 S.Ct. 1540, 1547 (2016) (party invoking
 12 federal subject matter jurisdiction has the burden of establishing standing).

13 Like under Rule 12(b)(6), conclusory allegations without supporting facts do
 14 not sufficiently demonstrate Article III standing under Rule 12(b)(1). *See, e.g.,*
 15 *Moore v. Way FM Media Grp. Inc.*, 2012 WL 13012659, at *7 (C.D. Cal. June 20,
 16 2012) (citations omitted). *See also Friedman v. Massage Envy Franchising, LCC*,
 17 2013 WL 3026641, at *4 (S.D. Cal. June 13, 2013) (holding that TCPA plaintiff
 18 lacked Article III standing where did not allege facts from which the court could
 19 “infer direct or vicarious liability”); *Hicks v. Alarm.com*, 2020 WL 9261758, at *5
 20 (E.D. Va. Aug. 6, 2020) (dismissing putative TCPA class action under 12(b)(1) and
 21 12(b)(6), holding that “[b]ased on the deficiencies identified under Rule 12(b)(6),
 22 Plaintiff also fails to properly plead causation and redressability” under Article III).

23 **IV. ARGUMENT**

24 Count I of the SAC (*see ¶¶ 36-40*) seeks relief under Section 227(b) of the
 25 TCPA and its related implementing regulations, which together provide, in pertinent
 26 part, that no person shall “make any call (other than a call made for emergency
 27 purposes or made with the prior express consent of the called party) using any
 28 automatic telephone dialing system [more commonly, an “autodialer” or “ATDS”] **or**

1 an artificial ***or*** prerecorded voice ... to any telephone number assigned to a ... cellular
 2 telephone service....” 47 U.S.C. § 227(b)(1)(A)(iii); *see also* 47 C.F.R. § 64.1200(a)(1)
 3 & (2) (emphasis added). Count II of the SAC (*see ¶¶ 42-47*) now seeks relief under
 4 the TCPA’s National DNC Registry provision which, along with its related
 5 implementing regulations, prohibits *inter alia* the “initiat[ion]” of more than one
 6 “telephone solicitation” call “by or on behalf of the same entity” in a 12-month period
 7 to a “residential telephone subscriber who has registered his or her telephone
 8 number” on the National DNC Registry. 47 U.S.C. § 227(c)(5); 47 C.F.R. §
 9 64.1200(c)(2). As demonstrated below, however, Plaintiff fails to plead any facts
 10 supporting the essential elements of such claims despite her amendments. She still
 11 relies instead primarily (if not exclusively) on unsupported conclusions,
 12 contradictory allegations, and recitations of the law in order to foist unwarranted
 13 TCPA liability on Defendant. That is insufficient to state any claim for relief in any
 14 federal court, and thus the entire SAC here should be dismissed under Rule 12(b)(6).

15 **A. The SAC Should Be Dismissed Under Rule 12(b)(6) Because**
 16 **Plaintiff Fails To Plead a Viable Theory of TCPA Liability.**

17 **1. Plaintiff Fails to Plausibly Allege Direct TCPA Liability.**

18 As an initial matter, there are two basic theories of potential TCPA liability,
 19 which must be sufficiently pled to state any TCPA claim under any provision: direct
 20 and vicarious liability. *See, e.g., Rogers v. Postmates Inc.*, 2020 WL 3869191, at *3
 21 (N.D. Cal. July 9, 2020) (citing *Thomas v. Taco Bell Corp.*, 582 F.App’x 678, 679
 22 (9th Cir. 2014)). In other words, “[f]or a person to ‘make’ [or ‘initiate’] a call under
 23 the TCPA, the person must either (1) directly make the call, or (2) have an agency
 24 relationship with the person who made the call.” *Pascal v. Agentra, LLC*, 2019 WL
 25 5212961, at *2 (N.D. Cal. Oct. 16, 2019) (quoting *Abante Rooter & Plumbing v.*
 26 *Farmers Grp., Inc.*, 2018 WL 288055, at *4 (N.D. Cal. Jan. 4, 2018)). As to the
 27 former, it is well-accepted that direct liability under the TCPA applies only to persons
 28 or entities that “make” or “initiate” calls, which in turn means the defendant “*tak[ing]*

1 ***the steps necessary to physically place***” a call or send a text message. *Sheski v.*
 2 *Shopify (USA) Inc.*, 2020 WL 2474421, at *2 (N.D. Cal. May 13, 2020) (citing *In re*
 3 *Dish Network, LLC*, 28 FCC Rcd. 6574, 6583 ¶ 26 (2013) (emphasis added)).⁶
 4 *Accord Hamilton v. El-Moussa*, 2020 WL 8993127, at *2 (C.D. Cal. Apr. 30, 2020)
 5 (dismissing on this basis under Rule 12(b)(6) and citing, *inter alia*, *Thomas*).

6 Additionally, it is also well-settled that any TCPA plaintiff hoping to allege a
 7 viable direct liability TCPA claim and to survive a motion to dismiss must offer much
 8 more than barebones legal conclusions and speculation that the defendant “made” or
 9 “initiated” the calls or texts at issue. *See, e.g., Sheski*, 2020 WL 2474421, at *2-4;
 10 *Frank v. Cannabis & Glass, LLC*, 2019 WL 4855378, at *2 (E.D. Wash. Oct. 1,
 11 2019).⁷ Calls allegedly made “on behalf” of a defendant are not enough to hold a
 12 defendant directly liable under the TCPA, either. *See, e.g., Bennett v. Celtic Ins. Co.*,
 13 2022 WL 865837, at *3 (N.D. Ill. Mar. 23, 2022) (dismissing, holding “a defendant
 14 ‘generally does not [physically] initiate calls [within the meaning of the TCPA] placed
 15 by third-party telemarketers,’ even if the third party had acted on its behalf”) (citation
 16 omitted); *Wick v. Twilio Inc.*, 2017 WL 2964855, at *3 (W.D. Wash. July 12, 2017)
 17 (“[M]erely offering a good or service for sale does not mean that a retailer initiates the
 18 marketing calls for that product”); *Bank v. Philips Elecs. N. Am. Corp.*, 2015 WL
 19 1650926, at *2 (E.D.N.Y. Apr. 14, 2015) (allegations the at-issue calls were “made
 20 by, or on behalf of, or with the authorization of, an authorized dealer of [defendant]”
 21 were “too conclusory to state a plausible claim” for direct TCPA liability).

22
 23 ⁶ Plaintiff does not allege she received any texts, which are generally considered “calls”
 24 under the TCPA. *See Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 952 (9th Cir.
 25 2009). However, the text cases cited herein are relevant and equally applicable.

26 ⁷ While various provisions of the TCPA use the terms “make” and “initiate” fairly
 27 interchangeably, federal courts evaluating (and ultimately dismissing) direct TCPA
 28 liability claims similar to Plaintiff’s, like those cited herein and many others, have
 uniformly held that “make” or “initiate” means to “physically” place the at-issue calls.
See also Brownlee v. Allstate Ins. Co., 2021 WL 4306160, at *1 (N.D. Ill. Sept. 22,
 2021) (holding “[a]t the very minimum, plaintiff must allege ... that defendant
 [physically] made each call that she seeks to hold it liable for” or face dismissal).

1 Instead, for direct TCPA liability to attach to Defendant in this case, Plaintiff
 2 would need to plausibly allege actual specific facts, and not just bald conclusions, in
 3 her SAC suggesting that **Defendant itself literally** called her *directly*. See, e.g., *Metzler*
 4 v. *Pure Energy USA LLC*, 2023 WL 1779631, at *6 (S.D.N.Y. Feb. 6, 2023) (holding
 5 that, to avoid dismissal on this basis, plaintiffs must “allege facts from which the Court
 6 can plausibly infer that [d]efendant has direct liability, even if it is also plausible that
 7 a third party made the call”); *In re Rules and Regs. Implementing the TCPA*, 30 FCC
 8 Rcd. 7961, 7980 (Jul. 10, 2015) (ruling that there must be a “direct connection between
 9 a person or entity and the making of a call” for direct TCPA liability).

10 Thus, applying these core principles, federal courts in the Ninth Circuit and
 11 across the country have routinely dismissed TCPA complaints at the pleadings stage
 12 under Rule 12(b)(6) on direct liability grounds that, like Plaintiff’s SAC here, lack
 13 such facts. See, e.g., *Sheski, Postmates, Abante, Pascal, Hamilton, and Frank, supra*;
 14 see also *Barnes v. SunPower Corp.*, 2023 WL 2592371, at *3 (N.D. Cal. Mar. 16,
 15 2023) (dismissing on direct liability grounds where plaintiffs did not plausibly allege
 16 the “[d]efendant itself” made the calls); *Salaiz v. eHealthInsurance Srvs., Inc.*, 2023
 17 WL 2622138, at *3 (N.D. Cal. Mar. 22, 2023) (dismissing on this basis where plaintiff
 18 did not allege the defendant “made the calls directly” to plaintiff); *Canary v. Youngevity Int’l, Inc.*, 2019 WL 1275343, at *3 (N.D. Cal. Mar. 20, 2019) (dismissing
 19 on this basis where allegations were “insufficient to support a plausible inference that
 20 [the defendant itself] made the call”); *Aaronson v. CHW Grp., Inc.*, 2019 WL
 21 8953349, at *2 (E.D. Va. Apr. 15, 2019) (dismissing where plaintiff “failed to plead
 22 facts sufficient to support a theory of direct liability under the TCPA because
 23 plaintiff’s allegations d[id] not show plausibly that defendant actually, physically
 24 initiated the telephone calls at issue”). This Court should do the same in this case.

25 As applied here, Plaintiff’s SAC does not plausibly allege that Defendant itself
 26 (as opposed to some third party) physically placed any of the calls at issue, as is
 27 indisputably required to plead a direct TCPA liability claim and avoid dismissal

1 under the weight of applicable federal authority. Instead, Plaintiff's threadbare and
 2 conclusory allegations merely suggest that she was possibly called either by
 3 Defendant or by an unidentified "third party" acting "on behalf" on Defendant and at
 4 Defendant's "direction and control." Dkt. 28, ¶¶ 17, 20, 22, 29, 44, 45. Yet, Plaintiff
 5 still pleads no actual facts supporting these naked conclusions. For example, she does
 6 not allege any facts connecting AAG to the phone numbers purportedly used to call
 7 her or to the callers—*e.g.*, that (i) "AAG" or "American Advisors Group" was even
 8 mentioned by any caller, (ii) Defendant owned or used those phone numbers, (iii) she
 9 called any those numbers back and reached "AAG," or (iv) Defendant's current or
 10 former name (AAG) appeared on her Caller ID. *See id.* In short, despite her few
 11 amendments and Defendant's prior motion pointing out this fatal defect, the SAC still
 12 contains ***nothing*** that might support a plausible inference Defendant physically called
 13 her, as is necessary to plead direct TCPA liability. *See, e.g., Abante Rooter, Frank, and*
 14 *Salaiz, supra; Smith v. Direct Building Supplies, LLC*, 2021 WL 4623275, at *3 (E.D.
 15 Pa. Oct. 7, 2021) (dismissing on this basis where complaint lacked such factual
 16 allegations about the numbers used and callers); *Aaronson*, 2019 WL 8953349, at *2
 17 ("[W]ithout any facts to explain why plaintiff believes the identified phone number is
 18 owned by defendant, ... plaintiff has failed to plead facts sufficient to support a theory
 19 of direct liability under the TCPA because plaintiff's allegations do not show plausibly
 20 that defendant actually, physically initiated the telephone calls at issue.").

21 At best, Plaintiff now alleges that she received an email *after* one of the calls,
 22 from someone using an "American Advisors Group" domain name (*see* Dkt. 28, ¶
 23 24)—which courts in this District have held does not support an inference that
 24 Defendant itself physically placed that one call or any other calls Plaintiff supposedly
 25 received, standing alone. *See, e.g., Hamilton v. El-Moussa*, 2020 WL 2614625, at *2
 26 (C.D. Cal. Feb. 10, 2020) (holding that alleged follow up email to plaintiff from
 27 defendant received after at-issue call insufficient to plausibly allege direct liability).

28 Further, Plaintiff's new conclusory allegation that the calls "announced the

1 commercial availability of Defendant's mortgage finance products and services" (Dkt.
 2 28, ¶ 39) does not save her from dismissal. On the one hand, she provides no
 3 description of the actual content of any of the calls to support an inference that she was
 4 offered any *AAG-specific reverse mortgage* products and services on any call (which
 5 is a specific type of mortgage that she alleges AAG offers), as opposed to the caller
 6 just asking about her "mortgage" generally. *See, e.g., Doyle v. GoHealth, LLC*, 2023
 7 WL 3984951, at *5 (D.N.J. Mar. 30, 2023) (dismissing where plaintiff "failed to allege
 8 that [callers] were attempting to sell him [defendant's]-specific Medicare services[.]").
 9 On the other hand, as noted above, it is well accepted that simply mentioning a
 10 defendant's name on a call (which Plaintiff does not allege happened here) or selling
 11 its products on a call does not support an inference that the defendant itself physically
 12 placed the call, as required to plead direct TCPA liability. *See, e.g., Bennett*, 2022 WL
 13 865837, at *3; *Wick*, 2017 WL 2964855, at *3; *Bank*, 2015 WL 1650926, at *2; *see also Abante Rooter*, 2018 WL 288055, at *4 (dismissing and holding allegations that
 15 plaintiff received a call from someone purportedly calling on behalf of the defendant
 16 and who identified defendant by name were insufficient for direct TCPA liability).

17 Further, the foregoing new allegation is a "sham" allegation, seemingly added
 18 to Plaintiff's SAC just to avoid dismissal, and thus it should be rejected on its face. In
 19 Plaintiff's previous complaint, she alleged that the calls "announced the commercial
 20 availability of Defendant's *hearing aid goods and services*" (Dkt. 17, ¶ 34 (emphasis
 21 added))—which Plaintiff acknowledges AAG does not sell—and not "mortgage
 22 finance products and services" as she now avers. Thus, even though it is entirely
 23 conclusory and not enough to plausibly allege direct TCPA liability standing alone,
 24 as demonstrated above, this Court need not accept this new contradictory allegation
 25 in Plaintiff's SAC as true for this motion. *See, e.g., Azadpour*, 2007 WL 2141079, at
 26 *2, n.2; *IV Sols., Inc.*, 2020 WL 5802017, at *2; *Forney*, 2017 WL 4685549, at *3.

27 Worse, Plaintiff's SAC only makes clear in the end that *she still does not know*
 28 who (if anyone) actually, physically called her in this case. In fact, as she did before,

1 Plaintiff repeatedly alleges, in a wholly conclusory fashion, that it was either AAG or
 2 an unidentified third party (or parties) who physically called her. *See, e.g.*, Dkt. 28, ¶¶
 3 17, 20, 22, 29, 44, 45. Such obviously “[c]ontradictory allegations” not only fail to
 4 state a direct TCPA liability claim, as the many authorities above show, but they also
 5 “are inherently implausible, and [thus] fail to comply with Rule 8, *Twombly*, and
 6 *Iqbal*” and cannot avoid dismissal under Rule 12(b)(6) in this or any case. *Hernandez*
 7 v. *Select Portfolio, Inc.*, 2015 WL 3914741, at *10 (C.D. Cal. June 25, 2015). *See*
 8 *also Bank*, 2015 WL 1650926, at *2 (allegations the at-issue calls were “made by, or
 9 on behalf of, or with the authorization of, an authorized dealer of [defendant]” were
 10 “too conclusory to state a plausible claim” for direct TCPA liability). Therefore, both
 11 of Plaintiff’s bald TCPA claims should be dismissed on direct liability grounds.

12 **2. Plaintiff Fails to Plausibly Allege Vicarious TCPA Liability.**

13 Plaintiff’s attempt to plead vicarious TCPA liability fares no better. Indeed, in
 14 this or any context, vicarious liability cannot be casually pled (as Plaintiff did), and
 15 courts uniformly require pleading sufficient facts before an otherwise innocent
 16 defendant can be hauled into court for the alleged acts of a third party. Instead, federal
 17 courts apply common law agency principles to determine vicarious TCPA liability.
 18 *See Jones v. Royal Admin. Servs., Inc.*, 887 F.3d 443, 450 (9th Cir. 2018) (citing, *inter*
 19 *alia*, Restatement (3d) of (“Restatement”) Agency § 1.01). This requires that all TCPA
 20 plaintiffs plead sufficient non-conclusory facts, in accordance with federal pleading
 21 standards, showing a special consensual relationship between a principal and an agent
 22 and the principal’s control over the alleged agent. *See* Restatement, § 1.01, cmt. c.

23 More specifically, “[a]gency is the fiduciary relationship that arises when one
 24 person (a ‘principal’) manifests assent to another person (an ‘agent’) that the agent
 25 shall act on the principal’s behalf and subject to the principal’s control, and the agent
 26 manifests assent or otherwise consents so to act.” *Naiman v. TranzVia LLC*, 2017 WL
 27 5992123, at *6 (N.D. Cal. Dec. 4, 2017) (quoting *Jones v. Royal Admin. Servs., Inc.*,
 28 866 F.3d 1100, 1105 (9th Cir. 2017)). This means “more than mere passive permission;

1 it involves request, instruction, or command.” *Linlor v. Five9, Inc.*, 2017 WL 5885671,
 2 at *3 (S.D. Cal. Nov. 29, 2017). “Though ‘the precise details of the agency relationship
 3 need not be pleaded to survive [dismissal], sufficient facts must be offered to support
 4 a reasonable inference that an agency relationship existed.’” *Meeks v. Buffalo Wild
 5 Wings, Inc.*, 2018 WL 1524067, at *5 (N.D. Cal. Mar. 28, 2018) (quoting *Kristensen
 6 v. Credit Payment Servs.*, 12 F. Supp. 3d 1292, 1301 (D. Nev. 2014)). As one federal
 7 district court dismissing a TCPA case on this basis aptly noted, plaintiffs “must allege
 8 **some** facts regarding the relationship between an alleged principal and agent” showing
 9 the defendant had the right to control the caller and calls, and “cannot simply allege
 10 general control in a vacuum.” *Melito v. Am. Eagle Outfitters, Inc.*, 2015 WL 7736547,
 11 at *7 (S.D.N.Y. Nov. 30, 2015) (emphasis in original). In short, the mere alleged
 12 “existence of **some** connections between the defendant and the maker of the call will
 13 not suffice” to plausibly allege vicarious TCPA liability and cannot avoid dismissal.
 14 *Bank v. Vivint Solar, Inc.*, 2019 WL 2280731, at *3 (E.D.N.Y. Feb. 25, 2019), *report
 15 and rec. adopted*, 2019 WL 1306064 (Mar. 22, 2019) (emphasis in original).

16 Further, in the TCPA context like in this case, the Ninth Circuit and other courts
 17 have widely recognized that vicarious liability cannot attach without the “essential
 18 ingredient” of control. *See, e.g., Jones*, 887 F.3d at 450. In this regard, “control” over
 19 an alleged caller in a TCPA case requires pleading specific non-conclusory facts
 20 suggesting that the defendant had control over **“the manner and means of the
 21 solicitation campaign that was conducted”** by the caller specifically, and not just
 22 “control” over an alleged agent generally. *In re Monitronics Int’l, Inc., TCPA Litig.*,
 23 223 F. Supp. 3d 514, 520 (N.D.W.Va. 2016), *aff’d sub nom.*, 885 F.3d 243 (4th Cir.
 24 2018) (emphasis added). *Accord Rogers v. Assurance IQ, LLC*, 2023 WL 2646468, at
 25 *6 (W.D. Wash. Mar. 27, 2023) (citing *Fabricant v. Elavon, Inc.*, 2020 WL 11884505,
 26 at *4 (C.D. Cal. Aug. 25, 2020)) (dismissing). *See also Meeks*, 2018 WL 1524067, at
 27 *6 (dismissing where there were no facts alleged that defendant controlled “whether,
 28 when, and to whom to send the text messages, along with their content”); *Bank*, 2019

1 WL 1306064, at *4 (dismissing where the plaintiff did not allege the defendant ‘had
 2 the power to give ‘interim instructions’ to [the agent], or any non-conclusory
 3 suggestion of ‘direction’ or ‘control’ by [the defendant] of [the agent]’) (quoting
 4 *Jackson v. Caribbean Cruise Line, Inc.*, 88 F. Supp. 3d 129, 139 (E.D.N.Y. 2015)).

5 Thus, federal courts in the Ninth Circuit (including in this District) and
 6 elsewhere have consistently dismissed TCPA claims premised on vicarious liability at
 7 the pleading stage, like Plaintiff’s, lacking sufficient facts establishing the defendant’s
 8 control over an alleged third party caller and its calling campaign. *See, e.g., Meeks,*
 9 *Linlor, Assurance, Fabricant, and TranzVia, supra; see also Naiman v. Freedom*
 10 *Forever, LLC*, 2019 WL 1790471, at *4 (N.D. Cal. Apr. 24, 2019) (determining
 11 plaintiff had not pled vicarious liability with “boilerplate” allegation as to agency that
 12 was “wholly conclusory”); *Canary*, 2019 WL 1275343, at *5-6 (determining plaintiff
 13 had not pled vicarious liability with “general and conclusory” allegations of agency
 14 where, as here, there was nothing showing defendant “exercised control” over the
 15 calls); *Hamilton v. El-Moussa*, 2020 WL 2614625, at *2-3 (dismissing, in part, on
 16 vicarious liability grounds where the agency allegations were merely conclusory and
 17 unsupported); *Barnes*, 2023 WL 2592371, at *3 (dismissing on this basis where
 18 plaintiff did not plausibly allege the defendant had an agency relationship with the
 19 caller, notwithstanding that she alleged she was transferred to the defendant and
 20 received an email from the defendant after the call); *Salaiz*, 2023 WL 2622138, at *3
 21 (dismissing where plaintiff did not allege a viable agency theory); *Postmates*, 2020
 22 WL 3869191, at *8 (dismissing where plaintiff failed to sufficiently “allege that [the
 23 defendant] had some degree of control over who sent the text and the manner and
 24 means by which it was sent”). This Court should reach the same conclusion here.

25 Indeed, Plaintiff’s SAC remains utterly devoid of facts demonstrating the
 26 “essential ingredient” of control by Defendant over any third party caller and its calling
 27 campaign, as required to state a viable vicarious TCPA liability claim. Rather, Plaintiff
 28 merely uses legal buzzwords (like “agent”) and concludes that unidentified third

1 parties called on its “behalf” or for its “benefit” with zero factual support. *See, e.g.*,
 2 Dkt. 28, ¶¶ 17, 20, 22, 29, 44, 45. As noted above, however, such bald conclusions do
 3 not remotely comply with federal pleadings standards and thus should not be accepted
 4 as true. *See, e.g.*, *Brodish v. New Elec. Fresno, LLC*, 2021 WL 3914259 at *2 (C.D.
 5 Cal. July 13, 2021); *see also Fabricant*, 2020 WL 11884505, at *4 (dismissing where
 6 the plaintiff’s agency “allegations [we]re not supported by facts that show[ed] ‘how
 7 [the defendant] did those things or how it knew those things’”) (quoting *TransVia*,
 8 2017 WL 5992123, at *13); *Barker v. Sunrun Inc.*, 2019 WL 1983291, at *3-4 (D.N.M.
 9 Apr. 29, 2019) (“Plaintiff’s alleged connection, that the offending calls were directed
 10 by or at least at the behest of Sunrun … constitutes a legal conclusion.”). And these
 11 unsupported allegations certainly do not plausibly allege Defendant had any specific
 12 “control” over the “manner and means” of the call campaign conducted by any third
 13 party caller, as required to avoid dismissal under Rule 12(b)(6) on this basis. *See,*
 14 *e.g.*, *Postmates, Assurance, Fabricant, Hamilton, Canary, and Barnes, supra*.

15 Plaintiff’s new vicarious liability theory that Defendant somehow “ratified the
 16 making of any such call” and “further accepted the benefit of such calls by ultimately
 17 providing its products and services to customers who were contacted as a result of any
 18 such calls” (Dkt. 28, ¶ 20) does not save her from dismissal, either. On the one hand,
 19 these new allegations are likewise wholly conclusory and speculative, are lacking in
 20 any supporting facts, and thus do not remotely comply with basic federal pleading
 21 standards. *See* discussion at pp. 5-7, *supra*. On the other hand, Plaintiff’s new
 22 ratification theory requires, among other things, sufficiently pleading “actual
 23 authority”—*i.e.*, alleging specific facts demonstrating Defendant had “control” over
 24 the caller and the manner and means of the call campaign—which Plaintiff plainly has
 25 not done here, as shown above. *See, e.g.*, *Pascal*, 2019 WL 5212961, at *4. *See also*
 26 *Linlor*, 2017 WL 588671, at *3 (“[T]he principal-agent relationship is still a requisite,
 27 and ratification can have no meaning without it.”) (quoting *Batzel v. Smith*, 333 F.3d
 28 1018, 1036 (9th Cir. 2003)); *Landy v. Nat. Power Sources, LLC*, 2021 WL 3634162,

1 at *3 (D.N.J. Aug. 17, 2021) (dismissing on this basis and holding “[a]n entity cannot
 2 be held [vicariously] liable under the TCPA ‘merely because they stand to benefit from
 3 the call’”) (citation omitted); *Hale v. Teledoc Health, Inc.*, 2021 WL 1163925, at *4
 4 (S.D.N.Y. Mar. 25, 2021) (“[T]he inclusion of Teledoc’s services in HII’s insurance
 5 bundle, alone, is insufficient to permit even a circumstantial inference that HII called
 6 plaintiffs at Teledoc’s direction or subject to Teledoc’s control. Plaintiffs’ conclusory
 7 allegations to the contrary are insufficient to ‘nudge’ plaintiffs’ claims from
 8 conceivable to plausible.”). Thus, any ratification theory fails from the very start.

9 Therefore, as Plaintiff has also failed to plausibly allege a vicarious liability
 10 theory, her entire SAC should be dismissed under Rule 12(b)(6) on this basis, as well.

11 * * *

12 All told, Plaintiff’s continued “either/or” pleading strategy has been rejected
 13 time and time again by countless federal courts. This Court should join them. Because
 14 Plaintiff fails to plead sufficient facts, in accordance with federal pleading standards,
 15 supporting a viable direct or vicarious TCPA liability claim, her entire SAC should be
 16 dismissed under Rule 12(b)(6). *See, e.g., Gulden v. Consol. World Travel Inc.*, 2017
 17 WL 3841491, at *3 (D. Ariz. Feb. 15, 2017) (dismissing and ruling that “*[b]ecause*
 18 *[the caller’s] identity is a necessary element of all of Plaintiff’s [TCPA] claims, this*
 19 *deficiency warrants dismissal of all of Plaintiff’s claims*”) (emphasis added).

20 **B. Plaintiff Also Fails to Plead Facts Supporting Essential Elements**
 21 **of Her Claim Under Section 227(b) of the TCPA (Count I).**

22 Beyond failing to plead a viable theory of liability, Plaintiff’s claim in Count
 23 I of the SAC under Section 227(b) of the TCPA fails for two additional reasons:

24 **First**, in its watershed decision in *Facebook v. Duguid*, the U.S. Supreme
 25 Court unequivocally held that: (i) the TCPA “requires that in *all cases*, whether
 26 storing or producing numbers to be called, *the equipment in question must use a*
 27 *random or sequential number generator*”; and (ii) a “random or sequential number
 28 generator” is “*a necessary feature*” of any ATDS. 141 S. Ct. 1163, 1170, 1173 (2021)

(emphasis added). *See also Anyaebunam v. ARS Account Resolution, LLC, et al.*, 2021 WL 4775146, at *3 (D.N.J. Oct. 13, 2021) (“The use of such a device is **essential** to a TCPA claim.”) (emphasis added). Thus, the vast majority of district courts in this Circuit and elsewhere applying *Facebook* (including in this District) have dismissed conclusory ATDS claims at the pleadings stage that, like Plaintiff’s, lack facts supporting an inference a random or sequential number was actually used to place the at-issue calls. *See, e.g., Wilbor v. GG Homes, Inc.*, 2022 WL 867024, at *5 (S.D. Cal. Mar. 22, 2022); *Eggleston v. Reward Zone USA LLC*, 2022 WL 886094, at *4 (C.D. Cal. Jan. 28, 2022); *Austria v. Alorica, Inc.*, 2021 WL 5968404, *6 (C.D. Cal. Dec. 16, 2021); *Anderson v. Wells Fargo Bank, Nat’l Ass’n*, 2021 WL 7186811, at *4 (D. Or. Dec. 10, 2021), *report and rec. adopted sub nom.*, 2022 WL 595736 (Feb. 28, 2022); *Wilson v. Rater8, LLC, et al.*, 2021 WL 4865930, at *2-3 (S.D. Cal. Oct. 18, 2021); *Gross v. GG Homes, Inc.*, 2021 WL 4804464, at *2-4 (S.D. Cal. Oct. 14, 2021); *Tehrani v. Joie De Vivre Hospitality, LLC*, 2021 WL 3886043, at *6-7 (N.D. Cal. Aug. 31, 2021); *Borden v. eFinancial, LLC*, 2021 WL 3602479, at *5-6 (W.D. Wash. Aug. 13, 2021), *aff’d*, 53 F.4th 1230 (9th Cir. 2022); *Stewart v. Network Cap. Funding Corp.*, 2021 WL 3088011, at *2 (C.D. Cal. July 16, 2021); *Hufnus v. DoNotPay, Inc.*, 2021 WL 2585488, at *1-2 (N.D. Cal. June 24, 2021).

Moreover, in interpreting *Facebook*, the Ninth Circuit has made even more clear that a dialing system “does not qualify as an ATDS merely because it stores [or even dials] pre-produced lists of telephone numbers” and instead it must actually **generate** the numbers called. *Meier v. Allied Interstate LLC*, 2022 WL 171933, at *1 (9th Cir. Jan. 19, 2022). *See also Borden*, 53 F.4th at 1233 (“Based on the TCPA’s statutory text and the Supreme Court’s recent decision in [*Facebook*], we hold that an autodialer must randomly or sequentially generate **telephone** numbers, not just any number.”) (emphasis in original); *Brickman v. U.S.*, 56 F.4th 688, 690 (9th Cir. 2022) (finding no ATDS violation where the caller “did not use a TCPA-defined autodialer that randomly or sequentially **generated** the telephone numbers in

1 question") (emphasis added). Applying these now well-accepted principles, this
 2 Court should rule similarly and dismiss Plaintiff's ATDS allegations on this basis.

3 In this case, Plaintiff's SAC at best still simply parrots the wording of the
 4 statutory text and *Facebook* and its progeny, and concludes without factual support
 5 that the caller (whomever that was) employed an "autodialer" to contact her. *See*,
 6 *e.g.*, Dkt. 28, ¶¶ 13, 25, 37, 38. These allegations do not remotely comply with federal
 7 pleadings standards and could not survive dismissal even before *Facebook*. *See, e.g.*,
 8 *Caruso v. Cavalry Portfolio Svcs.*, 2019 WL 4747679, at *4 (S.D. Cal. Sept. 30,
 9 2019) ("Plaintiff's complaint simply parrots the statutory definition of an ATDS and
 10 other provisions of the TCPA" without providing any call content or "any [other]
 11 circumstances that could support an inference that the calls were placed with an
 12 ATDS or artificial or prerecorded voice"); *Priester v. eDegreeAdvisor, LLC*, 2017
 13 WL 4237008, at *2 (N.D. Cal. Sept. 25, 2017) ("[T]he court rejects any contention
 14 that a TCPA plaintiff's pleading obligation is satisfied by generically alleging the use
 15 of an ATDS by a defendant, in a manner that simply parrots the statutory language.").

16 Additionally, Plaintiff also seemingly alleges the caller "dialed" from a *pre-*
 17 *produced* number "list," which runs afoul of the Ninth Circuit's ruling in *Meier* and
 18 its progeny; and it belies any notion her number was "generated" in any fashion. Dkt.
 19 28, ¶ 37. *See also Eggleston*, 2022 WL 886094, at *4 (applying *Facebook*,
 20 dismissing, and holding that "the equipment [involved] must use a number generator
 21 to generate the phone numbers *themselves*") (emphasis in original); *Samataro, et al.*
 22 *v. Keller Williams Realty, Inc., et al.*, 2021 WL 4927422, at *4 (W.D. Tex. Sept. 27,
 23 2021) (dismissing ATDS claim based on calls to numbers "compiled into a
 24 preproduced list of phone numbers, as opposed to generated randomly by an
 25 autodialer"). As such, Plaintiff's SAC does not and cannot plead an ATDS violation.

26 **Second**, Plaintiff likewise fails to plead any facts suggesting artificial or
 27 prerecorded voice use. On this front, her "complaint must include some factual
 28 allegations beyond 'the call had a prerecorded voice.'" *Smith v. Pro Custom Solar*

1 LLC, 2021 WL 141336, at *3 (D.N.J. Jan. 15, 2021). Again, while courts do not expect
 2 “technical specifications” about the specific delivery mechanism used, they do
 3 however uniformly require plaintiffs to plead sufficient supporting factual details from
 4 which a “prerecorded message” as opposed to a live human speaking can be inferred.
 5 *Johansen v. Vivant, Inc.*, 2012 WL 6590551, at *3 (N.D. Ill. Dec. 18, 2012).

6 As such, courts have widely held that, to avoid dismissal of such a claim, a
 7 complaint must contain some factual allegations beyond merely concluding any
 8 voice heard was “prerecorded” or “artificial,” and instead must provide sufficient
 9 contextual details from which it can be inferred that such a voice (as opposed to a
 10 live speaker) was used. *See, e.g., Trumper v. GE Capital Retail Bank*, 2014 WL
 11 7652994, at *2 (D.N.J. July 7, 2014); *Curry v. Synchrony Bank, N.A.*, 2015 WL
 12 7015311, at *2-3 (S.D. Miss. Nov. 12, 2015); *Reo v. Caribbean Cruise Line, Inc.*,
 13 2016 WL 1109042, at *4 (N.D. Ohio Mar. 18, 2016); *Saragusa v. Countrywide*, 2016
 14 WL 1059004, at *4 (E.D. La. Mar. 17, 2016), *aff'd* 707 F.App'x 797 (5th Cir. 2017);
 15 *Aaronson*, 2019 WL 8953349, at *3; *Caruso*, 2019 WL 4747679, at *4; *Manopla v.*
 16 *Sansone Jr's 66 Automall*, 2020 WL 1975834, at *2 (D.N.J. Jan. 10, 2020); *Winters*
 17 *v. Quicken Loans Inc.*, 2020 WL 5292002, at *4 (D. Ariz. Sept. 4, 2020); *Pro Custom*
 18 *Solar LLC*, 2021 WL 141336, at *3; *Assurance*, 2023 WL 2646468, at *4.

19 In this case, Plaintiff pleads no such contextual details in her SAC. Instead, she
 20 again merely repeats the statutory language without any supporting facts, and then
 21 baldly concludes that a “pre-recorded voice” was used. Dkt. 28, ¶¶ 22, 23. Such
 22 allegations are insufficient to plead a Section 227(b) TCPA claim, as the applicable
 23 federal authorities cited above (among many other cases) demonstrates. *See, e.g.,*
 24 *Manopla*, 2020 WL 1975834, at *2 (dismissing TCPA complaint that was “devoid
 25 of facts from which the Court could reasonably infer that a pre-recorded message was
 26 utilized” where, as here, the plaintiff failed to allege facts “regarding the tenor,
 27 nature, or circumstances of the alleged calls” and “merely proffer[ed] the content of
 28 the message and conclusory allege[d] that Defendant utilized a pre-recorded

1 message"); *Smith v. Pro Custom*, 2021 WL 141336, at *3 ("Absent some minimal
 2 description of the voice or message, Smith has put forward no more than a
 3 conclusion—not any factual allegations that allow me to infer a right to relief. For
 4 that reason, his SAC fails to state a claim for TCPA liability based on a prerecorded
 5 voice."). Thus, Plaintiff's attempted "prerecorded voice" TCPA claim likewise fails.

6 **C. Plaintiff Also Fails to Plead Facts Supporting Essential Elements**
 7 **of Her Claim Under Section 227(c) of the TCPA (Count II).**

8 Plaintiff's new DNC claim under Section 227(c) of the TCPA in Count II of
 9 the SAC likewise fails and should be dismissed for several additional reasons:

10 **First**, because Plaintiff fails to plead facts supporting direct or vicarious TCPA
 11 liability, as discussed at length above, she has not adequately alleged that she
 12 received more than one call physically initiated "by or on behalf of the same entity"
 13 in a 12-month period, as required. 47 U.S.C. § 227(c)(5) (emphasis added). Thus, her
 14 DNC claim naturally fails from the start. *See, e.g., Freedom Forever, LLC*, 2019 WL
 15 1790471, at *4 (dismissing DNC claim for not meeting this element where plaintiff
 16 failed to plausibly allege any facts supporting direct or vicarious TCPA liability).

17 **Second**, on its face, Section 227(c) of the TCPA only applies to a "residential
 18 telephone subscriber." 47 C.F.R. § 64.1200(c)(2). *See also Satterfield*, 569 F.3d at
 19 954 ("The TCPA was enacted to 'protect the privacy interests of residential telephone
 20 subscribers....'"') (quoting S. Rep. No. 102-178, at 1 (1991)). However, conclusory
 21 allegations or parroting the statutory text in this regard will not suffice either. Instead,
 22 it is well-accepted that all TCPA plaintiffs who wish to bring DNC claims must plead
 23 sufficient specific facts demonstrating that the subject phone number upon which the
 24 alleged calls were received is ***actually used*** for "residential" purposes. *See, e.g.,*
 25 *Morgan v. U.S. Xpress, Inc.*, 2018 WL 3580775, at *2 (W.D. Va. July 25, 2018);
 26 *Smith v. Vision Solar LLC*, 2020 WL 5632653, at *3 (E.D. Pa. Sept. 21, 2020); *Hicks*,
 27 2020 WL 9261758, at *5; *Gillam v. Reliance First Capital, LLC*, 2023 WL 2163775,
 28 at *4 (E.D.N.Y. Feb. 22, 2023); *Assurance*, 2023 WL 2646468, at *4; *Kemen v.*

1 *Cincinnati Bell Tel. Co., Inc.*, 2023 WL 361136, at *5 (S.D. Ohio Jan. 23, 2023). This
 2 is true even where the subject phone number is purportedly listed on the National
 3 DNC Registry. *See, e.g., Smith v. Vision Solar LLC*, 2020 WL 5632653, at *3
 4 (dismissing where plaintiff did not allege the “cell phone line in question is his
 5 residential phone, as required” to state such a claim under federal pleading standards);
 6 *see also id.*, Case No. 2:20-cv-02185 (E.D. Pa.), Dkt. 1, ¶ 17 (dismissed complaint in
 7 *Vision Solar*, alleging that the plaintiff’s cell phone number was registered on the
 8 National DNC Registry); *Hicks*, 2020 WL 9261758, at *5 (“Plaintiff argues at length
 9 that cellular phone numbers are eligible for listing on the Do Not Call registry—which
 10 appears to be undisputed—but his argument never returns to the facts of *this* case or
 11 the use of his phone.”) (emphasis in original).⁸ Plaintiff does not plead this element.

12 As applied here, Plaintiff pleads no facts in her SAC whatsoever indicating
 13 how her cell phone number is actually used, as courts uniformly require on this front,
 14 let alone facts supporting an inference it is the “primary means” of reaching her at
 15 her residence. Therefore, Count II should be dismissed for this reason, as well.

16 **Third**, Section 227(c) of the TCPA, again on its face, “relates solely to
 17 telemarketing and solicitation calls.” *Warnick v. Dish Network LLC*, 301 F.R.D. 551,
 18 558 fn. 3 (D. Colo. 2014). Thus, to survive dismissal here, Plaintiff must also plead
 19 facts suggesting her receipt of a “telephone solicitation,” which is defined in the
 20 TCPA’s implementing regulations as “the initiation of a telephone call or message
 21 for the purpose of encouraging the purchase or rental of, or investment in, property,
 22 goods, or services....” 47 C.F.R. § 64.1200(f)(15). However, Plaintiff’s SAC here
 23 includes virtually no facts, beyond her naked conclusions, regarding the content of
 24 the calls at-issue from which it can be reasonably inferred that any or all of them

25 ⁸ Further, as one district court aptly noted, whether someone qualifies as a “residential
 26 telephone subscriber” for purposes of a TCPA DNC claim generally depends on
 27 certain conditions, including in particular that the subject phone number on which the
 28 alleged calls were received “is the **primary means of reaching the individual at their
 residence**—that is, there is **no other landline or phone at their residence which is
 instead the primary means of reaching them**” there. *Mantha v. QuoteWizard.com, LLC*, 2022 WL 325722, at *6 (D. Mass. Feb. 3, 2022) (emphasis added).

1 constituted a “telephone solicitation” as defined by the implementing regulation
 2 above. In this regard, Plaintiff’s SAC at best: (1) alleges that the caller “***asked*** how
 3 much Plaintiff paid on her mortgage and the amount remaining on the mortgage”;
 4 and (2) from this threadbare allegation, she contradicts her previous allegations that
 5 the callers offered “hearing aid goods and services” and concludes, albeit still without
 6 factual support, that the calls “were for telemarketing purposes and announced the
 7 commercial availability of Defendant’s mortgage finance products and services.”
 8 Dkt. 28, ¶ 38. In addition to being a regurgitation of the statutory text, Plaintiff’s
 9 conclusory allegations on this front are plainly insufficient to avoid dismissal, as
 10 well. *See, e.g., Eggleston*, 2022 WL 886094, at *7 (dismissing DNC claim where the
 11 plaintiff “simply relie[d] on conclusory labels such as ‘advertisement’ and
 12 ‘promotion’ without any supporting factual detail” and noting this “falls short of
 13 [p]laintiff’s pleading burden to provide sufficient factual matter to state a plausible
 14 claim”); *Katz v. CrossCountry Mortg., LLC*, 2022 WL 16950481, at *6 (N.D. Ohio
 15 Nov. 15, 2022) (same, holding: “Without factual allegations as to the content of these
 16 calls, Plaintiff’s [complaint] fails to properly allege that such calls were solicitations
 17 under the TCPA.”). Therefore, Count II should be dismissed on these grounds, too.

18 **D. The SAC Should Also Be Dismissed under Rule 12(b)(1) for Lack of**
 19 **Federal Subject Matter Jurisdiction / Article III Standing.**

20 Dismissal of a complaint is required under Rule 12(b)(1) for lack of federal
 21 subject matter jurisdiction where a plaintiff fails to establish his or her Article III
 22 standing. *See, e.g., Washington Env’t Council v. Bellon*, 732 F.3d 1131, 1147 (9th Cir.
 23 2013). “The absence of any one element [out of the three required] deprives a plaintiff
 24 of Article III standing and requires dismissal.” *Aspen v. Newsom*, 2010 WL 2721458,
 25 at *1 (N.D. Cal. July 7, 2010) (citing *Whitmore v. Federal Election Comm’n*, 68 F.3d
 26 1212, 1215 (9th Cir. 1995)). Further, where a plaintiff lacks Article III standing to
 27 seek a particular form of relief, like injunctive relief, the Court lacks federal subject
 28 matter jurisdiction to award it and may dismiss that claim. *See, e.g., Miller v. Time*

1 Warner Cable Inc., 2016 WL 7471302, at *2-4 (C.D. Cal. Dec. 27, 2016). Here, the
 2 entire SAC is further subject to dismissal under Rule 12(b)(1) for multiple reasons:

3 **First**, Plaintiff’s failure to plausibly allege direct or vicarious TCPA liability,
 4 as discussed above, means she has also not established the causation and
 5 redressability elements for Article III standing. *See, e.g., Friedman*, 2013 WL
 6 3026641, at *4 (no standing where plaintiff did not plead direct or vicarious liability);
 7 *Hicks*, 2020 WL 9261758, at *5 (same, dismissing under Rule 12(b)(6) and 12(b)(1)).

8 **Second**, to meet the “causation” element, the “injury in fact” must be “fairly
 9 traceable” to the **defendant’s** conduct, rather than to a **third party’s**. *Lexmark*, 572
 10 U.S. at 125; *see also Lujan*, 504 U.S. at 560-61 (an injury is not fairly traceable if the
 11 injury complained of is “th[e] result [of] the **independent action of some third party**
 12 **not before the court**”) (quoting *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S.
 13 26, 41-42 (1976)) (emphasis added). As shown above, Plaintiff’s conclusory
 14 allegations suggest, at most, that the alleged calls complained of and the injury (if
 15 any) that the calls may have caused her are indeed the result of a third party not before
 16 this Court. *See* discussion at pp. 3-5 and 8-17, *supra*. Thus, Plaintiff has not satisfied
 17 the requisite causation/traceability element, requiring dismissal under Rule 12(b)(1).

18 **Third**, because Plaintiff has pled no facts showing any wrongful conduct
 19 attributable **to** Defendant, her injuries are incapable of being redressed **by** Defendant.
 20 *See Wash. Envtl. Council*, 732 F.3d at 1146 (All plaintiffs must show a “connection
 21 between the alleged injury and requested judicial relief.”). Indeed, imposing statutory
 22 or other damages on Defendant or enjoining it cannot possibly adequately redress, let
 23 alone prevent or correct, TCPA violations by third parties beyond its control.

24 **Fourth**, to establish Article III standing to seek injunctive relief in **any** federal
 25 case, Plaintiff must plead plausible facts suggesting a possible future injury to herself.
 26 *See, e.g., Jones v. Nutiva, Inc.*, 2017 WL 3617104, at *4 (N.D. Cal. Aug. 23, 2017);
 27 *see also Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 108-09 (1998) (a
 28 “generalized interest in deterrence” is insufficient to demonstrate Article III standing

for injunctive relief). Failure to allege such facts warrants dismissal of the request. *See, e.g., Miller*, 2016 WL 7471302, at *2-4 (dismissing request for injunctive relief in TCPA case on this basis); *Schaevitz v. Braman Hyundai, Inc.*, 437 F. Supp. 3d 1237, 1251-52 (S.D. Fla. 2019) (same). In this case, Plaintiff only makes a generalized requests for injunctive relief (*see, e.g.*, Dkt. 28, ¶¶ 5, 28, 34, and Prayer), but does not allege facts suggesting *she* is at risk of a possible *future* injury—*i.e.*, that she may possibly receive unlawful calls by or on behalf of Defendant in the future. Therefore, Plaintiff’s requests for injunctive relief should be dismissed at the minimum.

E. Any Dismissal Should Be With Prejudice.

10 Plaintiff already amended but, despite having the benefit of Defendant’s prior
11 dispositive motion laying out many of the same fatal defects above (*see* Dkt. 23), she
12 ultimately did not cure those defects and in some ways made those defects worse, as
13 demonstrated above. District courts in the Ninth Circuit routinely dismiss with
14 prejudice in such circumstances. *See, e.g., Frame v. Cal-W. Reconveyance Corp.*, 2011
15 WL 3876012, at *3 (D. Ariz. Sept. 2, 2011) (dismissing with prejudice where “despite
16 the benefit and existence of fully-briefed motions to dismiss, [p]laintiff’s First
17 Amended Complaint fail[ed] to cure the deficiencies noticed in [d]efendants’ prior
18 motions”). This Could should rule similarly in the present case. Plaintiff has had her
19 “day in court” and, if she had any actual facts to allege, she could (and should) have
20 pled them by now. That she did not leads to but one conclusion: no such facts exist.

V. CONCLUSION

22 For all the above reasons, the Court should dismiss Plaintiff's SAC in its
23 entirety and with prejudice under Fed. R. Civ. P. 12(b)(6) and/or 12(b)(1).

24 || Dated: October 11, 2023

Respectfully submitted,

MANATT, PHELPS & PHILLIPS, LLP

By: /s/ John W. McGuinness
John W. McGuinness

Counsel for Defendant

CERTIFICATE OF SERVICE

The undersigned counsel for Defendant certifies that the foregoing document was served on all Parties and their counsel of record through the Court's CM/ECF filing system on October 11, 2023.

By: /s/ John W. McGuinness
John W. McGuinness